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NOT TO BE PUBLISHED IN THE OFFICIAL REPORTS

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

FIFTH APPELLATE DISTRICT

THE PEOPLE, Plaintiff and Respondent, v. DAVID SMITH et al., Defendants and Appellants.	F060991 (Super. Ct. No. 08CM7523) **OPINION**

APPEAL from a judgment of the Superior Court of Kings County. Donna L. Tarter, Judge.

S. Lynne Klein, under appointment by the Court of Appeal, for Defendant and Appellant David Smith.

Laura P. Gordon, under appointment by the Court of Appeal, for Defendant and Appellant Stephen Dunkhurst.

Kamala D. Harris, Attorney General, Michael P. Farrell, Assistant Attorney General, Stephen G. Herndon and Sally Espinoza, Deputy Attorneys General, for Plaintiff and Respondent.

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David Smith and Stephen Dunkhurst were serving life terms at Corcoran State Prison when they attacked Donald Veith, another prisoner, with weapons made of sharpened metal and plastic. Both were convicted of assault with a deadly weapon while serving a life term and assault with a deadly weapon while in state prison. Both received sentence enhancements for personally inflicting great bodily injury and for having prior strike convictions. They now argue, and the People concede, that the convictions for assault with a deadly weapon while in state prison must be reversed because the statute creating the other offense, assault with a deadly weapon while serving a life term, explicitly disallows convictions of both.

In addition, Smith argues that there was insufficient evidence to support the finding that he personally inflicted great bodily injury on Veith; and Dunkhurst argues that we must reduce his restitution fine from the maximum of $10,000 to the minimum of $200, or else we must remand to allow the court to reconsider the fine, because the court relied on improper factors in setting the amount.

We accept the People's concession that the convictions for assault with a deadly weapon while in state prison must be reversed. We reject defendants' remaining arguments.

FACTUAL AND PROCEDURAL HISTORIES

On August 1, 2008, prison guards spotted a disturbance in a yard involving three prisoners and ordered all the prisoners in the yard to the ground. Guards saw Smith and Dunkhurst holding Veith by his wrists against a wall and making striking motions toward him. A guard shot Dunkhurst in the leg with a rubber bullet. Dunkhurst fell near a drain and was seen moving his hands toward it.

Veith, covered in blood, obeyed an order to come in from the yard, holding his hand over his left arm, from which blood was spurting. He was examined and found to have slash wounds on his arm and back, which required stitches. Smith and Dunkhurst had blood on their clothes and bodies but were uninjured, apart from the injury to

Dunkhurst's leg from the rubber bullet. Two sharp objects, one of metal and one of plastic, were later found in the drain. A blunt piece of plastic was found nearby; the sharp piece of plastic fit into it and was of the same color and kind of plastic.

The district attorney filed an information charging Smith and Dunkhurst with three counts each: (1) attempted murder (Pen. Code, §§ 187, 664);[1] (2) assault with a deadly weapon while serving a life prison sentence (§ 4500); and (3) assault with a deadly weapon while in state prison (§ 4501). Count 4, possession of a dirk or dagger in prison (§ 4502, subd. (a)), applied to Dunkhurst only. The information alleged that the offense in count 1 was committed willfully, deliberately and with premeditation. (§ 664, subd. (a).) It alleged in connection with counts 1 to 3 that both defendants personally inflicted great bodily injury. (§ 12022.7, subd. (a).) The information also alleged that Smith had a number of prior convictions within the meaning of section 667, subdivision (a)(1), and that Dunkhurst had a number of prior convictions within the meaning of sections 667.5, subdivisions (a) and (b), and 667, subdivision (a)(1). Further, Smith had three prior strikes and Dunkhurst had two prior strikes under the Three Strikes Law, sections 667, subdivisions (b)-(i), and 1170.12, subdivisions (a)-(d).

During trial, upon the prosecution's motion, the court dismissed count 1, the allegations associated with count 1, and all the allegations under sections 667, subdivision (a)(1) and 667.5, subdivisions (a) and (b). This left counts 2 to 4, the great bodily injury allegations, and the prior strike allegations.

The jury found Smith and Dunkhurst guilty of counts 2 and 3 and Dunkhurst guilty of count 4. It found the great bodily injury enhancements true. Both defendants admitted the prior strike convictions. Smith's prior strike convictions were for murder in 1984, assault with a deadly weapon while in state prison in 1987, and assault with a deadly

[1]Subsequent statutory references are to the Penal Code unless noted otherwise.

weapon while serving a life prison sentence in 2003. Dunkhurst's were for assault with a deadly weapon in 1990 and robbery in 1998.

For count 2, assault with a deadly weapon while serving a life prison sentence, the court imposed on each defendant a three-strikes sentence of 27 years (the three-year upper term, tripled) to life, plus three years for the great bodily injury enhancement. Defendants were to serve these sentences consecutively to the sentences they were already serving. For count 3, assault with a deadly weapon while in state prison, the court imposed on each defendant a sentence of 25 years to life, plus three years for the great bodily injury enhancement, and stayed these sentences pursuant to section 654. The court also imposed a sentence of 25 years to life on Dunkhurst for count 4 and stayed it pursuant to section 654. Both defendants were ordered to pay restitution fines of $10,000 and other fees.

DISCUSSION

I. Convictions under sections 4500 and 4501

Section 4500 creates the offense of "assault upon the person of another with a deadly weapon or instrument, or by any means of force likely to produce great bodily injury" by a person "undergoing a life sentence …." Section 4501 provides: "Except as provided in Section 4500, every person confined in a state prison of this state who commits an assault upon the person of another with a deadly weapon or instrument, or by any means of force likely to produce great bodily injury, shall be guilty of a felony …."

Smith and Dunkhurst argue that the "[e]xcept as provided in section 4500" clause of section 4501 means a defendant who is guilty under section 4500 cannot also be guilty under section 4501 for the same offense. The People concede this is correct. All parties cite a bill analysis for a 2004 amendment to section 4501 that added this clause. The analysis states that the amendment's purpose is to "clarify that Penal Code Section 4501 applies to all cases except for those covered by Penal Code Section 4500." (Sen. Rules

Com., Off. of Sen. Floor Analyses, Unfinished Business Analysis of Sen. Bill No. 1796 (2003-2004 Reg. Sess.) Aug. 14, 2004, p. 6.)

We agree with the parties. The plain meaning of section 4501 excludes conviction under that section based on facts for which the defendant was convicted under section 4500. Both defendants' convictions under section 4501 must be reversed.

II. Sufficient evidence that Smith personally inflicted great bodily injury

Smith argues that there was insufficient evidence to support the finding that he personally inflicted great bodily injury on Veith. When the sufficiency of the evidence is challenged on appeal, "the court must review the whole record in the light most favorable to the judgment below to determine whether it discloses substantial evidence—that is, evidence which is reasonable, credible, and of solid value—such that a reasonable trier of fact could find the defendant guilty beyond a reasonable doubt." (*People v. Johnson* (1980) 26 Cal.3d 557, 578; see also *People v. D'Arcy* (2010) 48 Cal.4th 257, 293.)

Section 12022.7, subdivision (a), provides:

> "Any person who personally inflicts great bodily injury on any person other than an accomplice in the commission of a felony or attempted felony shall be punished by an additional and consecutive term of imprisonment in the state prison for three years."

Our Supreme Court has stated that "a defendant personally inflicts great bodily harm only if there is a direct physical link between his own act and the victim's injury." (*People v. Modiri* (2006) 39 Cal.4th 481, 495 (*Modiri*).) Where a person "joins others in actually beating and harming the victim, and where the precise manner in which he contributes to the victim's injuries cannot be measured or ascertained," however, a personal-infliction finding may still properly be made. (*Ibid*.) Further, although being an aider and abettor of someone who personally inflicts great bodily injury is not enough by itself to support the enhancement, the imposition of the enhancement has been upheld where a defendant held a victim's head back by the hair to enable a coperpetrator to strike the victim's face with a weapon, after which the victim tried to flee and fell down a

mountainside, breaking her shoulder. (*People v. Dominick* (1986) 182 Cal.App.3d 1174, 1210-1211 (*Dominick*).)

Smith argues that the enhancement finding was not supported by sufficient evidence because "the evidence is clear that any slashing or stabbing injuries were caused by Dunkhurst as opposed to Smith." We disagree.

Correctional Officer Charles Moyer testified that he saw Veith standing with his back to the wall, holding his hands up in a defensive position. At the same time, Dunkhurst and Smith were making motions with their hands. Dunkhurst was "striking at" Veith and his movements were "[l]ike a stabbing motion, small circular stabbing motions at him." Smith "had his hand out towards Mr. Veith at the same time that Mr. Dunkhurst did, and his motion was an up-and-down type motion with his right hand." Smith's hand was "in a closed fist."

Correctional Officer Ronald Morgan saw the attack on Veith, but did not know Smith and Dunkhurst and was unable to identify them at trial. He saw two inmates confronting Veith as Veith's back was to the wall. He said, "[O]ne of the inmates that was a little more heavyset than the other one had [Veith] in a defenseless position, holding both wrists." Veith tried to pull away. At the same time, the other inmate "was attacking [Veith]." Morgan saw that inmate "making motions toward [Veith] and striking him."

On the basis of this evidence, combined with the evidence of Veith's injuries and the recovery of two weapons, the jury could reasonably conclude that Smith personally inflicted great bodily injury on Veith. From Moyer's testimony that Smith moved his closed fist in an up-and-down motion toward Veith as Smith and Dunkhurst had Veith at bay against a wall, and as Dunkhurst also made stabbing movements, the jury could reasonably infer that Smith used one of the weapons against Veith and inflicted some of the wounds. This inference would be sufficient to support the great bodily injury finding under *Modiri*, *supra*, 39 Cal.4th at page 495, for this is the situation in which the

defendant "joins [another] in actually beating and harming the victim, and where the precise manner in which he contributes to the victim's injuries cannot be measured or ascertained."

From Morgan's testimony that one inmate rendered Veith defenseless by holding his wrists while the other inmate attacked with striking motions, the jury could reasonably infer that Veith was being wounded during this time and that Smith either was wielding the weapon or was holding Veith while Dunkhurst wielded it. If Smith was using the weapon, it is obvious that Smith personally inflicted great bodily injury. If Smith was doing the restraining while Dunkhurst used a weapon, then the case is on all fours with *Dominick, supra*, 182 Cal.App.3d at pages 1210-1211, in which a defendant who restrained the victim by her hair while a coperpetrator struck her with a weapon, leading to a fall and a broken shoulder, was properly found to have personally inflicted great bodily injury.

Smith directs our attention to other evidence that he says undermines the inference that he personally inflicted great bodily injury. He argues that additional testimony Moyer gave when recalled to testify for the defense shows that Moyer did not really see Smith inflicting injury on Veith. Moyer agreed that he "never saw Mr. Smith strike Mr. Vieth …." He also gave the following testimony:

> "Q. Did you ever see [Smith] striking out at Mr. Veith at this point?
>
> "A. Like I said, I seen them striking at him. Their hands were closed when they made contact. I can't see."
>
> "Q. We're at [a certain point in a video recording of the incident]. And at that point had you seen Mr. Smith strike at or make contact with Mr. Veith?
>
> "A. All I seen was his hands were moving striking towards him. I did not see any contact.
>
> "Q. 'Striking'? What would you describe as Mr. Smith's 'striking' motion?

"A. His hands were closed and he was striking towards him.

"Q. … [¶] … [¶] … In [another portion of the video] is Mr. Smith making any type of striking motion?

"A. On this video it doesn't show it, but my angle it appeared to be he was swinging at him and his arms were moving.

"Q. But you don't see this in this video, do you? His arms are basically straight out in front of him; are they not?

"A. Mr. Smith?

"Q. Yes.

"A. Would you wind it back, please?

"Q. Absolutely.…

"At any point there did you see Mr. Smith striking towards Mr. Veith in a swinging motion?

"A. Yes, his hands were moving. And from my position up there, it appeared to be he was swinging at him.

"Q. So that was just your opinion that he was swinging at him.

"A. Yes.

"Q. Is—in further reviewing this video, do you still believe those to be swinging motions or did he simply have his hands up toward him?

"A. He was chasing him, so he was moving. His arms were moving.

"Q. So he was chasing behind him, but not swinging. His hands were simply moving?

"A. According to the video, yes.

"Q. Is that accurate as to what you saw?

"A. From what I saw at my point of view, no.

"Q. So your opinion that he was striking him is based on your perspective; is that correct?

"[The prosecutor]: Objection, that's argumentative. It's asked and answered.

"THE COURT: Sustained.

"[Smith's counsel]:

"Q. After viewing the video, would you change your characterization of his hand movements at that time?

"A. From what I saw and conceived at that time, I would have to.

"Q. How would you describe the hand movements now?

"A. As running—a running motion towards him."

On cross-examination by the prosecutor, Moyer stated that the video was poor because of glare from the sun, and that he was able to see more clearly at the time. He also reiterated that Smith's arm movements were "going from up to down."

This testimony is open to various interpretations. Smith would have us interpret it as Moyer's total repudiation of his previous testimony that he saw Smith make striking movements toward Veith. Another interpretation is that Moyer's point of view when witnessing the events revealed striking motions that were not visible from the camera's perspective, and Moyer merely acknowledged that what he saw and what the video showed were different. Neither Smith's interpretation nor ours is important, however, for purposes of a sufficiency of the evidence appeal. Within reason, the intepretation and weight given to the testimony were matters for the jury. The facts are simply that Moyer first testified that he saw Smith striking toward Veith with a closed hand and later testified that Smith's motions in the video looked different from the way he remembered them. The jury could reasonably find that the earlier testimony was persuasive in spite of the later testimony.

Smith also argues that *Modiri* is not controlling because "[t]his is not a case where Smith personally used force against … Veith and it is not possible to determine the cause of Veith's great bodily injury." He argues, first, that "[t]here was not any evidence

presented that Smith made any stabbing or slashing motions toward Veith …." As we have just said, however, the jury reasonably could have accepted Moyer's testimony that Smith made striking motions toward Veith and reasonably could have inferred that he was using one of the weapons when he did so.

Next, Smith argues that there was not "any evidence presented that it could not be determined who inflicted the slashing type injuries on Veith …." We disagree. There was evidence that Smith and Dunkhurst both assaulted Veith; that both made aggressive hand motions toward him during a short, confused burst of activity; that he sustained extensive cuts; and that two sharp implements were recovered from the scene of the attack. From this the jury could reasonably infer that Veith sustained cuts from both defendants and that any determination of which defendant inflicted which injuries would be speculative. Contrary to Smith's arguments, this inference is not defeated by the facts that only Dunkhurst was seen putting something in the drain where the weapons were found and only Dunkhurst was convicted of possessing a weapon. The jury could reasonably infer that there were two weapons because there were two assailants, and only Smith succeeded in disposing of his weapon without being observed. The inference also was not defeated by the fact that only Dunkhurst's motions were described as stabbing or slashing motions. The jury could reasonably find that Smith was moving his hands in a way consistent with inflicting Veith's injuries.

Attempting to distinguish *Dominick, supra*, 182 Cal.App.3d 1174, Smith argues that this "is not a case where there was evidence from which the jury could conclude that force applied by Smith could have caused the great bodily injury." As we have said, however, Morgan's testimony showed that Smith restrained Veith while Dunkhurst attacked him or vice versa. Smith says Morgan's testimony was only that one inmate *struck* Veith while the other restrained him, not that the inmate *slashed or stabbed* Veith, but this does not show a lack of substantial evidence to support the jury's finding.

Slashing wounds were the wounds Veith sustained. The jury could reasonably infer that these are the injuries Morgan saw being inflicted.

III. Dunkhurst's restitution fine

Dunkhurst argues that the court erred in imposing the maximum restitution fine of $10,000 under section 1202.4. We find no reversible error.

At the sentencing hearing, Dunkhurst's counsel submitted the case upon the probation report with respect to the prison sentence, but argued that the recommendation to impose the $10,000 maximum restitution fine should be rejected. Counsel contended that the $200 minimum fine should be imposed instead because Dunkhurst was indigent. The prosecutor countered by saying, "The $200 restitution fine is given when there is an early plea."

The court then proceeded to impose the sentence. It observed that Dunkhurst was ineligible for probation, but that even if he were eligible, the court would not grant probation because of "the serious and the violent nature of the offense in this case. The victim was confined in an exercise yard that was locked and the defendant—the defendants cornered him and attacked him inflicting great bodily injury." The court next imposed the prison term. Then it turned to the restitution fine. It said the prosecutor "is correct that the $200 standard fine is given when the defendants enter an early plea, which did not happen in this case. Therefore, the Court will order that the defendant pay $10,000 to the State Restitution Fund pursuant to 1202.4(b) of the Penal Code …."

Dunkhurst argues that the court's remarks show that it failed or refused to take account of a factor it was required to consider: his indigency. He says that if the court had not declined to consider that factor, it would have had to confront the fact that he is assigned to the Security Housing Unit and therefore lacks access to prison work programs and cannot earn money. Dunkhurst requests that we either modify the judgment to reduce the fine to $200 or remand to allow the court to make findings about his asserted indigency.

Section 1202.4, as it read in 2010,[2] stated that the court shall impose a restitution fine in every case in which a person is convicted of a crime, unless it finds compelling and extraordinary reasons not to do so, and states those reasons on the record. (§ 1202.4, subd. (b).) For a felony, the minimum fine was $200 and the maximum was $10,000. (§ 1202.4, subd. (b)(1).) A defendant's inability to pay was not a valid reason for imposing less than the minimum. (§ 1202.4, subd. (c).)

Section 1202.4 provides that, in setting an amount above the minimum, the court must take account of relevant factors:

> "[T]he court shall consider any relevant factors, including, but not limited to, the defendant's inability to pay, the seriousness and gravity of the offense and the circumstances of its commission, any economic gain derived by the defendant as a result of the crime, the extent to which any other person suffered any losses as a result of the crime, and the number of victims involved in the crime. Those losses may include pecuniary losses to the victim or his or her dependents as well as intangible losses, such as psychological harm caused by the crime. Consideration of a defendant's inability to pay may include his or her future earning capacity. A defendant shall bear the burden of demonstrating his or her inability to pay." (§ 1202.4, subd. (d).)

The statute specifies that "[e]xpress findings by the court as to the factors bearing on the amount of the fine shall not be required." (§ 1202.4, subd. (d).)

We agree with Dunkhurst that the court erred. The statute states that the court *shall* consider a defendant's inability to pay, but it is difficult to interpret the court's remarks as doing so. The natural interpretation of those remarks is that the court rejected defense counsel's argument that inability to pay should be considered, and instead embraced the prosecutor's view that this was irrelevant because Dunkhurst did not enter an early plea. The court was not required to make findings or give reasons for its

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[2]The statute was amended in 2011 to provide for increases in the minimum fine effective in 2012, 2013, and 2014. (Stats. 2011, ch. 358, § 1.)

decision, but in this case it did give a reason, and the reason it gave conflicts with the statute's requirement to consider any relevant factors, including ability to pay.

We turn to the question of prejudice. The applicable harmless error standard is that of *People v. Watson* (1956) 46 Cal.2d 818, 836: We affirm unless there is a reasonable probability of a better outcome for the defendant absent the error. Absent the error here, the court would have realized that it was required to consider Dunkhurst's inability to pay, but it still would have had discretion to impose the maximum fine after considering that factor. The record amply justified a decision to impose the maximum fine. Armed and in concert with an armed accomplice, Dunkhurst preyed on an unarmed victim. He was a second striker who was already serving a life term, yet he still reoffended. In *People v. McGhee* (1988) 197 Cal.App.3d 710, 717, we stated, "In our view, when the circumstances of a particular case are such that imposition of the upper term of imprisonment for a particular crime is justified, a trial court does not abuse its discretion in imposing the maximum restitution fine provided by law." Here, a sentence of triple the upper term to life was imposed under the three strikes law. It is true that section 1202.4 did not include the language requiring consideration of all relevant factors, including ability to pay, in 1988 when *McGhee* was decided, and as we have said, the court in this case erred when it declined to consider that factor. It is not reasonably probable, however, that if the court had followed the statutory requirement to consider Dunkhurst's ability to pay, it would have concluded that a smaller fine should be imposed. The circumstances of the offense, combined with the court's evident lack of inclination to be lenient, show there is no real chance this would have happened.

Dunkhurst also contends that the court's reason for selecting the maximum fine was unconstitutional. He says the reference to an early plea means the court was penalizing him for exercising his right to a jury trial. We do not understand the court's remarks that way. We interpret the remarks to mean that an early plea is a factor the court would have considered as reason for leniency if Dunkhurst had entered one, but since he

did not enter one, that factor was irrelevant. The court did not mean it was imposing the maximum fine to punish Dunkhurst for going to trial. As a reason for leniency, we do not see any impropriety in considering an early plea. The Rules of Court state that an early admission of wrongdoing is a factor in mitigation. (Cal. Rules of Court, rule 4.423(b)(3).) We know of no authority stating that this rule penalizes defendants for exercising their constitutional rights.

DISPOSITION

Both defendants' convictions under section 4501 are reversed. The trial court shall forward amended abstracts of judgment, omitting those convictions and all sentences, fines and fees based on them, to the appropriate prison authorities. The judgments are affirmed in all other respects.

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Wiseman, Acting P.J.

WE CONCUR:

_____
Levy, J.

_____
Gomes, J.